

U. S. DEPARTMENT OF LABOR  
Employees' Compensation Appeals Board

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In the Matter of WANDA A. RASCH, claiming as widow of ROBERT R. RASCH, JR. and  
DEPARTMENT OF THE ARMY, HEALTH SERVICES COMMAND,  
FORT BRAGG, N.C.

*Docket No. 96-1455; Oral Argument Held December 3, 1997;  
Issued March 19, 1998*

Appearances: *Kathleen G. Sumner, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the  
Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration pursuant to section 8128 of the Federal Employees' Compensation Act.

This is the second appeal in this case.<sup>1</sup> By decision dated April 25, 1994, the Board remanded the case for further development of the evidence. The facts of this case are more fully set forth in that decision and are herein incorporated by reference.

On October 19, 1990 a claim was filed on behalf of the employee's survivors alleging that while the employee was changing an "expired nerve agent antidote (atropine)" on October 11, 1990, the "autoinjector went off and penetrated [his] right index finger."<sup>2</sup> The claim included a witness statement verifying the facts as alleged. The employee stopped work on October 12, 1990 and returned to work on October 16, 1990 for approximately one day. The employee died on October 19, 1990.

By decision dated December 5, 1991, the Office found that the evidence of record supported the occurrence of the October 11, 1990 work incident. However, the Office further found that the evidence of record failed to establish that the incident resulted in an injury within the meaning of the Act.

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<sup>1</sup> See Docket No. 93-957 (issued April 25, 1994).

<sup>2</sup> On May 28, 1992 appellant filed a claim for death benefits on behalf of herself and her two children.

By letter dated May 28, 1992, appellant requested reconsideration of the December 5, 1990 Office decision.

The record contains the employee's death certificate dated October 23, 1990 reflecting the date of death as October 19, 1990 and the cause of death as "viral syndrome with encephalitis and thrombocytopenia."

In a narrative report dated November 13, 1990, Dr. V.B. Mehta, a physician whose specialty is not indicated in the record, related that appellant had been hospitalized on October 18, 1990 and he provided a history of the course of treatment. He noted that the employee had died on October 19, 1990 and that he had discussed with the employee's wife possible diagnoses of meningitis and encephalitis and that permission for an autopsy was not initially granted but the employee's wife later changed her mind and requested an autopsy which was performed on October 20, 1990. Dr. Mehta indicated the probable cause of death as "no anatomic cause of death identified" but noted that the death certificate gave the cause of death as "viral syndrome with encephalitis and thrombocytopenia."

In an autopsy report dated October 20, 1990, Dr. Jerald S. Wolford, a Board-certified pathologist, provided findings on examination and related the employee's course of treatment prior to his death. Dr. Wolford noted that the employee's body had been partially embalmed before being returned for an autopsy. He stated:

"The terminal cardiac arrest was most likely precipitated by myocarditis and preexisting hypertensive cardiomegaly. There was also a 'TTP [thrombotic thrombocytopenic purpura]-like' syndrome characterized by consumptive thrombocytopenia, microangiopathic hemolytic anemia, neurologic symptoms and fever. The etiology of the myocarditis and the 'TTP-like' syndrome is presumed to be infectious, but no agent has been identified."

Dr. Wolford listed as the probable cause of death "no anatomic cause of death identified."

By decision dated November 24, 1992, the Office vacated its December 5, 1991 decision and accepted the claim for the condition of puncture wound of the right index finger but determined that the evidence of record did not establish that the employee's death was caused by the work incident of October 11, 1990.

By letter dated February 2, 1993, appellant, through her representative, filed an appeal with the Board.

Upon remand of the case by the Board, the Office, by letter dated May 26, 1994, requested that the employing establishment provide additional information including the contents of the syringe that the employee was working with when his finger was punctured on October 11, 1990, whether the syringes were contaminated and, if so, the substance with which they were contaminated. The Office requested that the employing establishment send copies of any test results that might be available on the syringes and copies of any witness statements regarding the incident.

In a memorandum to the file dated August 26, 1994, an Office senior claims examiner noted that the employing establishment had failed to respond to a request for information regarding the employee's activities on October 11, 1990 when his finger was punctured and that, therefore, appellant's contention that her husband sustained an injury from contaminated injectors was taken as factual.

By letter dated August 29, 1994, the Office referred the employee's medical records and a statement of accepted facts to Dr. Thomas Thommi, a Board-certified internist with a specialty in geriatric medicine, for an evaluation and an opinion as to whether the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death. The Office asked Dr. Thommi to provide rationale to support his opinion.

In an undated report received by the Office on December 1, 1994, Dr. Thommi related that he had reviewed the medical records and that it appeared that the employee sustained an accidental contaminated needle stick injury to the right index finger. He stated that it appeared that the employee then developed medical confusion, fever, anemia, thrombocytopenia, splenomegaly and microangiopathic hemolytic anemia. Dr. Thommi stated that it appeared that the employee had gone through a "TTP-like" syndrome leading to death, probably secondary to cardiac involvement. Dr. Thommi stated:

"Autopsy study showed no evidence of an infectious agent. Blood serology done for infectious disease was inconclusive and is expected to be so in early stage of infection. Further testing with electron microscopy or histochemical stains may have identified a probable infectious source if any was present.

"On the data provided to me I do not see any evidence of infection by foreign organisms such as staph or streptococcus leading into the 'TTP-like' syndrome. It is impossible to say whether the needle stick [led] to his ultimate death. It is probably unlikely because a common organism transmitted by needle stick would be gram-positive organism, maybe gram-negative. None were found on routine testing. Exotic infections such as rickettsia rickettsii are usually not transferred by needle stick.

"When the words 'contaminated needle stick' were used in the records, I am not sure what the word 'contaminated' means. Whether it just implies broken sterile syringes.

"This person may well have had an infectious cause for the 'TTP-like' syndrome. It appears to me that the needle stick may not have contributed to it. It is impossible to be 100 [percent] certain."

By decision dated December 21, 1994, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish causal relationship between the employee's death and the work incident on October 11, 1990.

By letter dated December 10, 1995, appellant, through her representative, requested reconsideration of the denial of benefits. Appellant noted that the Board had remanded the case

to the Office to obtain additional evidence from the employing establishment as well as a description of the employee's activities on October 11, 1990 and that the Office was then directed to refer a statement of accepted facts and the case record to a Board-certified specialist in the appropriate field for an opinion as to whether the October 11, 1990 employment incident caused, hastened, precipitated or contributed to the employee's death but that the Office failed to do this. Appellant argued that Dr. Thommi, the Office referral physician, was an internist who did not have any special knowledge of infectious disease and merely stated that it was impossible to be 100 percent certain as to the cause of death. Appellant also indicated that the fact that the employee had been partially embalmed prior to the autopsy may have made it more difficult to establish the cause of death. The employee argued that the case should be referred to an appropriate medical specialist.

In a nonmerit decision dated January 12, 1996, the Office denied appellant's application for further merit review of the case on the grounds that the evidence submitted in support of the application for review was found to be of a repetitious nature, irrelevant, immaterial and insufficient to warrant any further merit review of the prior decision.

The Board finds that this case is not in posture for a decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>3</sup> As appellant filed his appeal with the Board on April 10, 1996, the only decision properly before the Board is the Office's January 12, 1996 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's December 21, 1994 and November 24, 1992 merit decisions denying compensation benefits.

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

Under section 8128 of the Act, the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,<sup>4</sup> which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or a fact not previously considered by the Office,  
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

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<sup>3</sup> 5 U.S.C. § 8128.

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>5</sup>

In this case, by letter dated December 10, 1995, appellant requested reconsideration of the Office's December 21, 1994 decision. Appellant argued that the referral physician, Dr. Thommi, a Board-certified internist with a subspecialty in geriatric medicine, was not an appropriate specialist to determine whether the penetration of the employee's finger by an autoinjector containing an expired nerve agent could have caused or contributed to his death. Appellant argued that Dr. Thommi did not have any special knowledge of infectious disease and merely stated that it was impossible to be 100 percent certain as to the cause of death. Appellant also noted that the fact that the employee's body had been partially embalmed prior to the autopsy, making it even more critical to have an appropriate specialist review the case. Thus, appellant presented a point of fact not previously considered by the Office, that is, the Office did not select an appropriate medical specialist in this case.<sup>6</sup> Appellant therefore complied with the requirements of 20 C.F.R. § 10.138(b)(1)(ii). The Board therefore finds that the Office abused its discretion in failing to consider appellant's factual argument. Consequently, the Office improperly denied further merit review of the December 21, 1994 decision.

The decision of the Office of Workers' Compensation Programs dated January 12, 1996 is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
March 19, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> The Board has held that the opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians. *Lee R. Newberry*, 34 ECAB 1294, 1299 (1983).